United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1356

To be argued by
SUSAN E. SHEPARD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1356

UNITED STATES OF AMERICA,

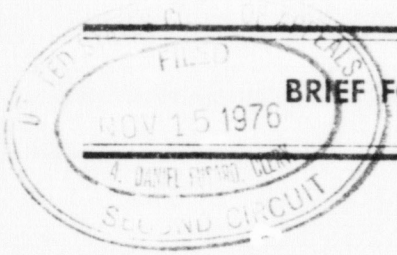
Appellee,

—against—

MARIO CAICEDO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



BRIEF FOR THE APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATUTES

OTHER AUTHORITIES

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BRIEF FOR THE APPELLEE

Preliminary Statement

Mario Caicedo appeals from a judgment of conviction of the United States District Court for the Eastern District of New York (Costantino, *J.*). After a jury trial, appellant was convicted of possession with intent to distribute cocaine (Count One) and distribution of cocaine (Count Two), both in violation of Title 21, United States Code, Section 841(a)(1). He was sentenced to concurrent four-year terms of imprisonment followed by a five-year term of special parole. Appellant is presently in custody.

On appeal, appellant, who does not challenge the sufficiency of the evidence, raises two issues. First he alleges that it was reversible error for the trial court to refuse to admit into evidence a file of the Immigration and Naturalization Service (INS). Second, he contends that his convictions on Count One and Count Two merged, and that, accordingly, he should be resentenced.

Statement of the Case

The Government's witnesses at trial were Drug Enforcement Administration (DEA) Agents Cruz Cordero and Robert P. Jones, DEA chemist Jeffrey Weber, Benjamin Feinstein, owner of Economy Car Rental, and Joseph P. McNally, an expert in handwriting analysis. Their testimony established the following facts.

On April 30, 1974, at about 2:00 p.m., an informant introduced Agent Cordero to the defendant for the purpose of arranging a sale of cocaine. The three men met in the parking lot of Wetson's Drive-In Restaurant at Flatbush Avenue and Empire Boulevard in Brooklyn (T. 31, 55, 88).[1] Speaking in Spanish, Cordero asked Caicedo if he had the package of cocaine, and Caicedo replied that he had only a sample with him (T. 33-34, 57). Then the three men walked down Empire Boulevard to Franklin Avenue where they entered a brown Ford with license number 777ZAN (T. 34, 88-89). Caicedo had rented this car from Economy Car Rental in Brooklyn on April 26, 1974. It was established by the testimony of a handwriting expert that Caicedo had personally signed his name to the rental agreement for this car.[2] (T. 121-122, 130, 138-139).

Caicedo drove Cordero and the informant to his apartment at 480 East 23rd Street. (T. 41, 89). During the ride, Caicedo stated that he was making about $900

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[1] All references preceded by "T" refer to the transcript of January 15, 1976. References preceded by "TT" are to the transcript of January 16, 1976. This description is necessary inasmuch as the pagination of each transcript begins with page 1.

[2] The evidence established that Caicedo had rented cars from Economy Car Rental on eight occasions between February 22, 1974, and December 2, 1974. (Tr. 129-131).

a day selling cocaine. When Cordero said that he would do business in the future if he were satisfied with the purchase, Caicedo agreed, stating that he would take care of his customers. (T. 34-36). During the ride, Caicedo handed Cordero a plastic bag containing the sample of cocaine, which weighed about 24 grams, stating that it was cocaine. (T. 36, 58-60, 112).

When they arrived at 480 East 23rd Street, the three men entered Caicedo's apartment, Apartment 1A. They followed Caicedo to the kitchen. (T. 41). Cordero then stated that he wanted to purchase one-eighth kilogram of cocaine, and Caicedo replied, "Right on." Caicedo stated that his price was $3000. (T. 42). He then asked Cordero if he were interested in purchasing a half kilogram of cocaine and stated he was charging $15,000 for the half kilogram. (T. 43). Because he had to go to his room to get the cocaine, Caicedo left the kitchen and returned with a plastic bag containing about 5½ ounces of cocaine. He took out a scale, measured one-eighth kilogram for Cordero, removed the rest of the cocaine and returned the one-eighth kilogram to the bag. Caicedo handed the plastic bag containing the one-eighth kilogram of cocaine to Cordero, and Cordero paid him $3000. (T. 43-44, 112). Caicedo then said that the cocaine he had removed from the bag was for the informant because he had introduced Cordero to him. As Caicedo was about to hand the informant a bag containing the additional cocaine, Cordero took it, saying it was better for the informant not to carry any drugs with him. (T. 44-45, 112).

Caicedo, Cordero, and the informant then walked into the living room and Cordero asked Caicedo how he could contact him about purchasing the half kilogram of cocaine. At that point, Caicedo handed Cordero a matchbook cover on which he had written his first name and

telephone number so he could call during the week. (T. 48). Cordero asked Caicedo how he had brought the cocaine into the country, and Caicedo replied, "I had a good way." (T. 50).

The three men then left the apartment and entered the same brown Ford in which they had driven to the apartment. Caicedo drove them to the vicinity of the Wetson's parking lot. During the ride, Caicedo told Cordero that if he wanted to purchase cocaine he should come to his apartment or call him. Cordero agreed. In the vicinity of Flatbush Ave. and Maple Ave., Cordero and the informant left the car. (T. 50-51, 61, 89-90).

Appellant called in his behalf one Sylvia McAllan, who testified that she was, at the time of trial, pregnant with appellant's child. Ms. McAllan then stated that she saw Caicedo board a plane at Kennedy Airport in July or August, 1973. According to McAllan, the next time she saw Caicedo was on July 3, 1974. (TT. 32-33). Appellant also called, as his witness, Agent Jones, the DEA case agent who had earlier testified for the prosecution. It was through Agent Jones that appellant sought unsuccessfully to introduce the INS investigative file. Appellant then rested.

The Government then called two rebuttal witnesses, DEA Agents Thomas L. Lentini and John Andrejko. They corroborated the testimony of Agents Cordero and Jones, stating that while engaged in surveillance on April 30, 1974, they observed Caicedo meet with Cordero and a second man at Wetson's parking lot, they followed Caicedo when he drove to 480 East 23rd Street in a brown Ford with license number 777ZAN, and they followed him again when he left the building at that address with Cordero and another man, reentered the car, and dropped the men off at Flatbush and Maple Avenues. (TT. 40-41, 52-55).

ARGUMENT

POINT I

The trial court did not commit error with respect to appellant's Immigration and Naturalization Service file.

Appellant contends that the refusal of the district court to admit the entire INS file, containing over 95 documents that had nothing to do with this case, was somehow error. In support of this argument he points to 5 documents, 4 of which were not specifically referred to in the district court, and which are now claimed to have been relevant to appellant's defense. The argument appears to be that because the INS file was characterized as a "public document", it should have been received into evidence and that it was not necessary to have an INS official, familiar with its contents, testify as to the various entries. We contend that this argument is incorrect and the district court properly refused to allow the entire INS file to be placed into evidence through the DEA case agent.[3]

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[3] The appellant's Immigration and Naturalization Service file, which contained over 100 documents, was produced by the prosecutor, who had possession of the file, although the defense subpoena had been issued to the Immigration and Naturalization Service. This file contained five documents which, it is now argued, are relevant to the appellant's defense that he had been out of the United States during the time of the cocaine transaction. At trial, however, only one document was specifically referred to and, after argument, it was admitted into evidence. Following an in-camera inspection, the file was turned over to defense counsel, who then sought to introduce the entire file through Special Agent Jones, the DEA case agent, who had been recalled for this purpose. Although the Government conceded that the file was indeed appellant's INS file (TT. 11), objection was made on the ground that the DEA case agent was not the proper person to testify as to its contents and that it was not relevant (TT. 13). The district court sustained the objection on the first ground (TT. 14, 16) and also held that the file was not

[Footnote continued on following page]

Turning first to the INS file,[4] it will be seen that over 95% of its contents have no bearing on the question of whether appellant was in Brooklyn on April 30, 1974, the date of the offenses alleged in the indictment. Indeed, by referring to only 5 documents (one of which was accepted into evidence) out of the entire file of over 100 items, appellant concedes, in effect, that the bulk of the INS file was irrelevant. Thus the court's refusal to allow the entire file into evidence was correct and, indeed, required, under Rule 402, Fed. R. Evidence, which provides, in part that: "Evidence which is not relevant is not admissible." To have permitted the introduction of the entire file would have been confusing and misleading. *Cf.* Rule 403, Fed. R. Evidence.

It was counsel's obligation, not the court's, to identify with particularity the documents that were claimed to be relevant. It should not be enough for appellant, for the first time on appeal, to point to 4 specific documents in a file of more than 100 separate items, and urge that the existence of these 4 documents, even if relevant—which we dispute—somehow made the entire file admissible.

To claim that the documents were admissible solely because they can be characterized as public documents, the authenticity of which was not disputed, is disingenuous. Certainly Rule 803(8), Fed.R.Evidence, provides that public records and reports are admissible as an exception to the hearsay rule. That does not end the analysis, how-

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relevant (TT. 13, 15). During the course of further discussion, the prosecutor stipulated to the introduction of a particular document in the file, a letter to INS from the NYC Department of Social Services, containing the following notation: "The records of this service reflect that Mario Caicedo Cabezoz departed from the U.S. to Colombia 8-6-73" (Ex. D-4).

[4] The file has been made a part of the Record on Appeal pursuant to a stipulation between the parties.

ever. First, the document must be relevant. Rule 402, Fed.R.Evidence. An examination of D-1, D-2, and D-3[5] shows that, absent explanatory testimony by an INS official, they are not, in and of themselves, relevant. For example, D-1, entitled "Deportation Case Check Sheet", does not indicate the date that the voluntary departure was effected, nor how the INS established this fact, nor that it actually occurred. D-2 is an internal INS-memorandum indicating nothing more than that an appearance bond in appellant's name (D-3) was cancelled. Consequently, appellant should have, as suggested by the district court, called an INS witness who could explain the file entries.[6]

Second, although Rule 803(8), Fed.R.Evidence, permits the introduction of public records and documents, the Rule expressly requires that the entries be trustworthy. This requirement is clarified by the Advisory Committee's Notes which state that the Rule does not "dispense with the requirement of first hand knowledge". 4 Weinstein's Evidence, p. 803-32. Thus, it was certainly proper for the district court to hold that the DEA agent was "not the proper witness to testify as to the file" (TT. 14) and to require the appellant to call an INS official familiar with the file (TT. 16, 24). Turning to D-5, for instance, it appears likely that this entry was based on the declaration of the appellant himself rather than on an official INS entry report. If so, and this could not have been explored without a witness, the entry should have been excluded as self-serving.

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[5] These items are numbered as set forth in the Appendix.

[6] Contrary to appellant's assertion, the district court told appellant to call "the man who made the entries, and ask him where he got his information from; that's what you must do. *I am not preventing you at all.*" (Emphasis added; TT. 24).

Therefore, the failure of appellant to specifically seek to introduce these documents, rather than the entire file, coupled with his failure to call the proper witness to both explain the entries and establish their trustworthiness should be dispositive.

Concerning Exhibit D-4, which was admitted into evidence, appellant contends that the district court by its instruction effectively nullified this document. However, what the district court did, and properly we submit, was to advise the jury of the scope of the stipulation pursuant to which D-4, the letter from the Welfare Department, was introduced. Although this instruction may have been inartful, the failure of defense counsel to make any objection prevents this question from being raised on appeal absent plain error. Rule 52 Fed.R.Crim.Proc. It cannot be seriously contended that this statement of the court, if error at all, constituted plain error. Moreover, trial defense counsel in summation must have understood that the district court was not nullifying the document since he read from it and reminded the jury that they could examine it during their deliberations if they desired (TT. 79).

Finally, due to the overwhelming proof that appellant was in Brooklyn on April 30, 1974, which was established by the eyewitness testimony of four DEA agents and by handwriting evidence, we submit that if there was any error at all with respect to the INS documents, it was harmless error. This conclusion is compelled because the INS documents, at most, would tend to establish that appellant had left the United States in August 1973 and entered in July 1974. They do not relate to the question whether appellant was in Brooklyn on April 30, 1974. Indeed, it appears appropriate to note that the INS file shows that appellant had a record of illegal entry into the United States. Consequently, his entries, of course, would not always appear in the official INS records.

POINT II

Appellant's convictions under the two counts of the indictment did not merge.

Appellant contends that because his conviction under Count 1 of the indictment, possession of cocaine with intent to distribute (21 U.S.C., § 841(a)(1)), merged with his conviction under Count 2, distribution of cocaine (21 U.S.C., § 841(a)(1)), the case should be remanded for resentencing.

In fact, however, because each count requires proof of a fact which the other does not, the convictions do not merge. Moreover, there was independent evidence of possession with intent to distribute apart from evidence of the actual sale.

In interpreting § 841(a)(1), it has been held that the two offenses do not merge. *United States* v. *Horsley*, 519 F.2d 1264, 1265-66 (5th Cir. 1975). In *Horsley*, as here, the defendants were convicted on separate counts of possession with intent to distribute a controlled substance and distribution of the substance. In affirming the convictions on the separate counts, the Fifth Circuit used the "different evidence" test, which is that convictions for separate offenses resulting from a single transaction are upheld if each statutory violation requires proof of different facts and elements. The *Horsley* Court followed the reasoning in *United States* v. *Costello*, 483 F.2d 1366, 1368 (5th Cir. 1953), that possession and distribution were separate offenses. The decision in *Costello* was based on the fact that possession was complete upon receipt of drugs from a third party while distribution required subsequent transfer to a third party.

In general, a person may be convicted of two different crimes arising out of the same transaction as long as each of the crimes requires proof of a fact that the other does not. *Blockburger* v. *United States*, 284 U.S. 299 (1932); *Perkins* v. *United States*, 526 F.2d 688 (5th Cir. 1976); *United States* v. *Cedar*, 437 F.2d 1033 (9th Cir. 1971). Under § 841(a)(1), the charge of possession with intent to distribute does not require proof of distribution, while the distribution charge does not require proof of possession with intent to distribute, or even possession. *United States* v. *Stevens*, 521 F.2d 334, 337 (6th Cir. 1975). Indeed, in an analogous situation involving possession and distribution of counterfeit stamps, *United States* v. *Cioffi*, 487 F.2d 492 (2d Cir. 1973), this Court held that, for purposes of double jeopardy, the crimes did not merge. Indeed, this Court stated:

> Although it would be rare for a seller not to have at least constructive possession, such a case is conceivable, e.g., if A, a middleman, sells B counterfeit owned by and in possession of C, and the contraband is delivered directly to B by C. *Id.* at 496.

Thus, similarly, the crimes of possession with intent to distribute cocaine and distribution of cocaine are totally separate crimes, each requiring proof of a fact which the other does not. Since proof of one offense, thus, does not automatically prove the other, a conviction of both offenses should not merge into a single conviction.

The cases appellant cites for his claim that the crimes charged in Counts One and Two merge are not dispositive of the issue. In three of them, *United States* v. *Stevens*, *supra; United States* v. *Curry*, 512 F.2d 1299, 1306 (4th Cir. 1975); and *United States* v. *Atkinson*, 512 F.2d 1235 (4th Cir. 1975), the Courts held that where there is *no* evidence of possession with intent to distribute a con-

trolled substance apart from evidence of the actual distribution, the offenses merge. Even if that were the proper test to apply, this is not the situation in this case. Caicedo told agent Cordero that he had an additional one-half kilogram of cocaine he was willing to sell for $15,000 (T. 43). This is sufficient evidence in itself from which a jury could have concluded that appellant possessed additional cocaine which he intended to distribute. Therefore, the actual sale of cocaine by appellant was not the only evidence presented to the jury on the possession charge.

A fourth case cited by appellant in support of his claim of merger, *United States* v. *Howard*, 507 F.2d 559 (8th Cir. 1974), is likewise inapposite. In *Howard*, the Court held that a defendant could not be convicted of both distribution and a lesser included offense. This is not the situation here. Indeed, appellant does not even claim that either distribution or possession with intent to distribute is a lesser included offense of the other.

The other case appellant cites, *Prince* v. *United States*, 352 U.S. 322 (1956), is also not in point. In *Prince*, appellant was charged with robbery of a federally insured bank and entry into the bank with intent to commit a felony, both in violation of Title 18, United States Code, Section 2113. The Court held that the two crimes merged, but it based its holding on a construction of Section 2113 together with the legislative intent. Moreover, the Court recognized that in other situations, as with post office theft and forcible entry into a post office with intent to commit a larceny under Title 18, United States Code, Section 2115, the crimes would not merge.

Finally, this Court, in *United States* v. *Vasquez*, 468 F.2d 565 (2d Cir. 1975), and *United States* v. *Gaines*, 460 F.2d 176 (2d Cir. 1972), has refused to review a

conviction where an appellant, convicted on more than one count, received concurrent sentences of less than the maximum term. In this case, where appellant received concurrent four year sentences, well below the fifteen year maximum, it would be appropriate for the Court, under the concurrent sentence doctrine and in the exercise of its discretion, to affirm appellant's conviction.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: November 12, 1976

Respectfully submitted,

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